Section 158 of the Evidence Ordinance provides that any former statement may be used to corroborate the testimony of a witness. As the information contradicted the evidence on oath this section was clearly inapplicable.

The section 156 (c) of the Evidence Ordinance provides that the credit of a witness may be impeached by the adverse party, or with the consent of the Court, by the party who calls him, by proof of former inconsistent statements.

It is impossible to say whether the prosecution were trying to impeach the credit of the complainant. Certainly there is no record that the Court gave the prosecution permission to do. In any case the only effect of impeaching the credit of a witness is to render his sworn evidence valueless. The learned District Judge however seems to have considered that he was at liberty to accept the unsworn statements of a witness, upon which he was never cross-examined in preference to his statements on oath at the trial. Such a procedure is quite unjustifiable upon any principle whatever.

The same comments apply to the statement alleged to have been made verbally by the complainant in Hospital.

The only other evidence, if it may so be called, consisted of statements alleged to have been made by the complainant's brother, of what the complainant is alleged to have said to him. Apart from the fact that the brother denied on oath having made any such statements, such evidence was the merest hearsay and totally inadmissible.

In my opinion there was no evidence against the accused at all, and he ought never to have been called upon for his defence. The appeal was therefore allowed, and the conviction quashed and the sentence set aside.

Appeal allowed. Conviction quashed.

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, Ag. C. J.

November 19, 1937

CHIA HAN KIAT ..... **Appellant**

vs.

REX ..... **Respondent**

[SINGAPORE MAGISTRATE'S APPEAL No. 45 of 1937]

Criminal procedure—summary trial—lateness of delivery of judgment—effect of—appeal against findings of fact—powers of appellate court to overrule Judge of first instance.

Where the evidence of the complainant before the Criminal District Court was concluded and judgment was not given until nearly six months later, the result was that it was almost impossible for the Judge to remember the impression which a witness had made many months ago and an appellate court would in such circumstances be in an equally good position to weigh the evidence as the District Judge himself.

Discussion of the principles which should guide the High Court in hearing an appeal from the decision of a District Judge when the matter in question is one of fact.

On such an appeal it is the duty of the Appellate Court to be a Judge of fact as well as of law, and the Appellate Court would be abrogating its functions if it made a hard and fast rule never to interfere with findings of fact and if it felt bound to support a judgment which, on a review of all evidence, it considered to be clearly wrong.

MAGISTRATE'S APPEAL.

Braga for the appellant.

Storr Crown Counsel, for the respondent.

Cur. Ad. Vult.

TERRELL, AG. C. J.—The accused was charged on three charges:

(1) With cheating the complainant in respect of a sum of $40 on the 16th April, 1936, or alternatively with committing criminal breach of trust of such sum.

(2) A similar charge and alternative charge in respect of another sum of $40 on the 1st May, 1936.

(3) A charge of cheating by inducing the complainant to sign receipts for $87.03 and $65.77 on the 11th June, 1936 on the pretence that the documents signed were summonses.

One Kwong Kek was charged with abetting the above offences. The appellant was convicted in the alternative on charges (1) and (2), and on charge (3). Kwong Kek was convicted of betting.

The appellant was first brought before the Court on the 27th October, 1936. The trial actually commenced on the 21st December. On that day, and the following day, the complainant had completed his evidence. Judgment was given on the 1st June, 1937, nearly six months later. This long interval is of importance, as it is almost impossible for a Judge to remember the impression which a witness made when months have elapsed, and innumerable other cases have in the meantime been heard and considered. The learned District Judge in fact admits the difficulty in paragraph 12 of his grounds of Judgment.

This is admittedly an appeal against findings of fact, and I fully indorse the principle that an appellate Court should but rarely interfere with the conclusions arrived at by the Judge or Magistrate who has had the advantage of hearing the witnesses and obtaining an impression of their veracity from their demeanour. But it is the duty of an Appellate Court to be a Judge of fact as well as of law, and it would be abrogating its functions if it made a hard and fast rule never to interfere with findings of fact, and felt bound to support a judgment which, on a review of all the evidence, it considered to be clearly wrong.

It is necessary therefore to examine the evidence in order to ascertain whether the learned District Judge was justified in finding that the prosecution had established the guilt of the appellant beyond reasonable doubt.

The evidence in support of the charges was as follows:—In respect of the first $40, the only evidence is that of the complainant and one Luk Siong. In the case of the second $40, the only evidence is that of the complainant who produced Exhibit F, saying that appellant had told him that it was a receipt for $40.

In respect of the third charge, the only evidence is that of complainant.

It was common ground that the complainant had some $400 of debts outstanding in respect of a charcoal business. On the 16th April, 1936, the complainant made an arrangement with the appellant whereby the appellant was to collect the outstandings at a commission of 50%, and the complainant gave the appellant a written authority dated 16th April, 1936 to enable him to do so (Exhibit D). The appellant conducted most of the business in connection with the collection through his usual solicitors, Messrs. da Silva & Co. The appellant admits having collected altogether $223.34 (see Exhibit Y2).

On or about the 15th June, 1936 it appears that the 2nd accused, Kwong Kek, asked the complainant for $70 on account of costs in connection with a claim against the complainant by one Ho Pat. The complainant went to the lawyers' office with one Cheong Ah Kun, and saw Mr. Oehlers who said that he wanted not $70 but $25 which the complainant promised to pay. The complainant however had become suspicious of the appellant, and on the 18th June, consulted another lawyer, Mr. De Mello, who wrote on his behalf a letter (Exhibit Y1) in which it was alleged for the first time that the complainant had advanced $80 on account of lawyers' fees. The next day, the 19th June, Messrs. Claude da Silva & Co., who were now acting for the appellant, denied the recepit of $80, and claimed that they had already paid the appellant two sums of $87.03 and $72.27 for which they held receipts. They also said that their client had collected in addition $64.04, and after deducting $12.50 for legal costs, they claimed that the complainant had been overpaid to the extent of $47.38. This was again denied by the complainant (Exhibit Y3) and on the 22nd June the complainant made a report to the police, and on the 26th June swore an information praying for warrant of arrest against the appellant and Kwong Kek. The Magistrate, Mr. Davis, minuted on the information that the case was not strong enough to justify the issue of warrants without corroboration of the complainant's statements, and referred the matter to the police for investigation.

On the 29th June the appellant issued his civil claim for $45.38. The claim was heard before the assistant District Judge and on the 9th October the claim was dismissed. No grounds of judgment were given. On the 22nd October the magistrate granted warrants of arrest against both accused on the previous information.

Now I have already pointed out that the charges against the accused rested almost solely upon the evidence of the complainant himself. As regards the first $40, the complainant's statement in his report (Exhibit 2) is quite clear, and is to the effect that on the 16th April the complainant met Kwong Kek, the 2nd accused, and that they went together to the appellant's house 12 Keong Siak Road. There the complainant signed the letter of authority, and gave the appellant $40. The information proceeds:

> "He said that when he had collected the money I could deduct the $40 from his share. I and Kwong Kek then returned to my house."

The information sworn four days later is to much the same effect though there are certain inconsistencies. The information repeats the visit with Kwong Kek to the appellant's house, the signing of Exhibit D and the payment of the $40. It continues:

> "They then took me to Messrs. Claude da Silva & Company's office. On arrival there Ah Kiat asked me not to go inside x x x x but to wait outside while he went in."

In the report the complainant makes no mention of a visit to the lawyers' office on the 16th April, but the important point about which the report and the information agree is that there is no mention of anyone else being present when the first $40 was paid except the complainant, the appellant and Kwong Kek. In fact the passage in the report "I and Kwong Kek then returned to my house" (i.e. from appellant's house) makes it quite clear that no one else was present.

Then the civil action was heard. The appellant, who was plaintiff, gave evidence on the 29th July, 1936 that the letter of authority (Exhibit D) was signed by the complainant at 12. Kiong Siak Road in the presence of Kwong Kek. He was cross-examined as to the alleged payment of $40, but it was never suggested to him that anyone else was present. The case was continued on the 1st and 9th of September, 1936 and on the 28th September, 1936 the complainant gave his evidence. He said he went to the appellant's house on the 14th April with Kwong Kek and was asked for $40, and two days later paid the $40. He did not at first suggest that anyone else was present, but at the very end of his examination in chief he said that one Loh Siong was present, and may have seen the $40 paid. Then on the 8th October, Lok Siong was called and says he saw the money paid.

Lok Siong also gave evidence in the criminal case. It appears that he had been in the complainant's employment at a small wage for seven years and that his eyesight was defective.

In estimating the value of Lok Siong's evidence it is pertinent to remember (1) that his existence was never mentioned in the Report

and the Information, in fact the report is inconsistent with his presence. (2) During the civil action the appellent was never cross-examined as to whether he was present (3) the complainant himself only mentioned that he was present, apparently as an afterthought. (4) Exhibit D, the authority to the appellant to collect the debts, contains a space for the signature of a witness. If it were true that Lok Siong was present when Exhibit D was signed, it is reasonable to suppose that Lok Siong would have been asked to witness the document. (5) The complainant was well aware that a warrant had been refused because his story was entirely uncorroborated. (6) Lok Siong was an employee of the complainant at a small wage and presumably dependent on him.

In these circumstances it is difficult to understand how the learned District Judge could attach any weight whatever to Lok Siong's evidence.

In the result the whole case for the prosecution rests on the evidence of the plaintiff. On one point only, not immediately material to the charges, was he corroborated by one Cheong Ah Kun. I will deal with this evidence later.

As regards the complainant himself his conduct is, of course, as relevant as his actual statements.

I have already pointed out that when the civil proceedings commenced on the 29th July, 1936 the complainant had obviously not instructed his lawyer as to the presence of Lok Siong. This is, of course, consistent with his failure to mention Lok Siong either in the Report or the Information. Two months later, on the 28th September, Lok Siong is mentioned, apparently as an afterthought, for the first time. This fact alone should have thrown the gravest doubt upon the complainant's veracity. But there are many other indication which should have made the learned District Judge hesitate before he attached so much weight to his evidence. I refer to the following:—

(1) On complainant's story, the appellant had never paid him the sums of $87.09 and $72.27, but, on the contrary, had received $80 for which he had not accounted. So from there being a sum of $47.38 due to the appellant there was a far larger balance due to the complainant. The complainant, however, never counterclaimed for such balance. He filed a defence setting out his story and claiming that the whole dispute involved a question of account which was outside the jurisdiction of the District Court. He apparently wished to avoid any finding of fact on the issues raised.

(2) The complainant alleges that Exhibit F was given to him as a receipt for $40. Exhibit F reads as follows:—

"Please pay direct to
Messrs. Claude da Silva & Co., Ltd.
6A, Raffles Place,
Singapore."

It is not stamped, it is not signed and it contains no figures. It was clearly an authority to be signed by the complainant for the purpose of allowing the solicitors to obtain payment direct from the complainant's debtors.

The complainant understands English figures. Nevertheless, he prevailed on the learned District Judge to believe that the appellant told him that it was a receipt for $40 and that he accepted it as such.

(3) Although the complainant is a business man he obtained no receipt for the second $40.

(4) The third charge is in connection with the two receipts (Exhibits H1 and H2) for $87.03 and $65.77 dated respectively the 14th May and the 26th May, 1936. The complainant says that he signed these at the request of the appellant and that he was told that they were District Court Summonses. The receipts now bear receipt stamps but the complainant says such stamps were not there when he signed. Exhibit H1 contains a series of figures and it is putting too great a strain on the credulity of the Court to accept the complainant's story that he could possibly have mistaken Exhibit H1 as a summons for a single debt.

(5) The complainant states that he was asked by the appellant through Kwong Kek for $70 on the 13th June. On the 15th June he consulted Cheong Khun and they went together to see Mr. Oehlers. Mr. Oehlers told the complainant that he only wanted $25 for preparing the accounts. The appellants promised to pay this sum, but he made no mention of the $80 which, according to complainant's story, had already been paid to the appellant to give to Mr. Oehlers in connection with his fees.

(6) The only point on which the complainant is corroborated is in connection with the $70. Cheong Khun states that complainant brought him a letter (Exhibit K) and said that complainant had said that it was a letter from a lawyers' office asking for $70 for the arrest of Ho Pat. The witness did not read the letter. The complainant does not support Cheong Khun's statement. In his evidence in chief he says that Mr. Oehlers handed the appellant Exhibit K in his office and the appellant

handed it to the complainant saying:—

> "This is the letter referring to Ho Pat. You can take it home."

Exhibit K is, in fact, a letter from Ho Pat's solicitors, asking for accounts, and Mr. Oehlers naturally wanted a fee for preparing the accounts. Mr. Oehlers says in his own evidence that he did originally ask for $70, but eventually, on looking into the matter, he only wanted $25.

The whole transaction in connection with Exhibit K appears to be quite simple and straightforward, but the learned District Judge seems to treat the incident as in some way implicating the appellant. No doubt Cheong Ah Kun did accompany the complainant to Mr. Oehlers' office, but it is difficult to understand how that affects the guilt of the appellant.

I have only referred to a few points in the complainant's evidence and conduct which appear to me to result in the gravest suspicion being thrown on the complainant's veracity. Even if the learned District Judge had recorded that he accepted him without hesitation as a witness of truth, it would still have been necessary for an appellate Court to weigh carefully whether the learned District Judge had not drawn incorrect inferences from accepted facts, or had omitted to give sufficient weight to obvious inconsistencies. This difficulty, however, does not arise as in his grounds of judgment the learned District Judge has expressly stated that it was difficult, after many months, to remember the impression which the witness had made upon him. The appellate Court is therefore in an equally good position to weigh the evidence, and I have no hesitation in saying that the learned District Judge completely misdirected himself as to the weight of evidence, and that the case for the prosecution was never established, and in fact that the appellant should never have been called on for his defence.

The appellant however was called on and gave what appeared to be a perfectly straightforward story, corroborated in many details by Mr. Oehlers, an advocate and solicitor of this Court. The appellant, as appears from the District Court proceedings, is a timber merchant. When the complainant asked for his assistance he consulted Messrs. da Silva & Company who had been his regular solicitors for the past seven years. The learned District Judge however formed a very unfavourable opinion of the appellant, as appears (*inter alia*) in paragraph 21 of the grounds of judgment, which commences:—

> "No. 1 deserves no leniency. He held himself out by his conduct to be a lawyer's clerk, but he appears to be a tout who goes round canvassing for work to give lawyers."

The statement that he held himself out as a lawyer's clerk depends solely on the evidence of the complainant. For the reasons stated above I do not think that this evidence should have been accepted, but at least there was some evidence. But of the allegation that he was a lawyer's tout there was no evidence whatever. It may be that the learned District Judge, with his wide experience, has found that lawyers' touts are generally not to be believed on their oath, though I can hardly accept such a proposition as an irrebutable presumption, or as the equivalent of a rule of law or a rule of evidence. But at least the promise must be established. If the learned District Judge took an unfavourable view of the appellant's evidence because he quite wrongly assumed that he was a lawyer's tout, an appellate Court can only infer that he considered such evidence from an entirely wrong angle, and that his conclusion upon the weight of such evidence is valueless.

The appeal must therefore be allowed, the conviction quashed and the fines and sentences of imprisonment remitted.

The second accused has not appealed, but his convictions for abetment cannot stand. I accordingly call for the record in his case with a view to exercising my powers of revision.

Appeal allowed.

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.